IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 15.2.2002

CORAM :

THE HONOURABLE MR.JUSTICE V.S.SIRPURKAR

Writ Petition No.881 of 1996

D. Ramasamy .. Petitioner

-Vs-

1.The Appellate Authority under
Payment of Gratuity Act cum
Deputy Commissioner of Labour
Salem.

2.The Controlling Authority under
Payment of Gratuity Act-cum-
Assistant Commissioner of Labour
Salem.

3.The Management of Salem Refractories
represented by its Managing Director
Mr.Prakash Metha
Karuppur, Salem 636 012. .. Respondents

Petition under Article 226 of the Constitution of India praying for the issue of a Writ of Certiorari as stated therein.

For Petitioner : Mrs.G.Shanthi Meenakshi
for Mr.P.K.Rajagopal
For Respondents :
RR 1 & 2 : Mrs.Thenmozhi Sivaperumal
Addl.Government Pleader
R3 : Mr.M.R.Raghavan

* * * * *
: O R D E R

The present petition is filed by an employee, who is being refused his payment of gratuity under the Payment of Gratuity Act.

2. Initially, the authority concerned had found him entitled to the payment of gratuity of Rs.7,007/- on the basis of eight years service rendered by him to the organisation Salem Refractories Private Limited. It is an

admitted position that this petitioner has actually served the organisation for eight years. It is also an admitted position that he was being paid an honorarium of Rs.1,735/- per month and that after eight years of service, he resigned from the organisation. The payment of gratuity having been refused to him, he approached the authorities under the Payment of Gratuity Act and as stated earlier, the first authority found him entitled. However, in an appeal, the appellate authority took the view that since he was paid honorarium and since he was a retired employee (from other organisation), he was not an employee within the meaning of Section 2(e) of the Payment of Gratuity Act and that it could not be said he was earning wages as he was being paid only honorarium. The appellate authority, it seems, has relied upon the following two decisions:

1.Binay Kumar Chatterjee v. Jugantar Ltd. And Others (1983 II L.L.N.30)
2.Edwin A Daniel and another v. Labour Court, Coimbatore and another (1993 I L.L.N.169)

The only reason why the appellate authority has come to the conclusion that the petitioner was not an employee is on account of the law laid down in these decisions. Therefore, it will be better to consider these decisions.

3. In the Binay Kumar Chatterjee's case, the employee was serving the same organisation and he retired therefrom and thereafter he sought a fresh employment under contract and that was not continuation of the original service. The Supreme Court was concerned with Section 14 of the Working Journalists (Conditions of service and Miscellaneous Provisions) Act and it came to the conclusion that the workman could not contend that the further employment given to him was in reality a continuation of the previous employment and that the termination of his service should be taken to be effective from the date of termination of the fresh contract and that he should be given the benefit of continuation. Firstly, this is not a case under the Payment of Gratuity Act and secondly, the factual matrix is also different, in the sense that, the petitioner herein was not an erstwhile employee of the employer. His was an independent and separate contract dehorse of and apart from the earlier employment. Further, this is not a question of continuation being claimed by the employee. Therefore, the law laid down in this case would not be applicable.

4. The other case of Edwin Daniel is again no different. There, this decision which is rendered by Honourable Justice M.Srinivasan as his Lordship then was, suggests that an employee who was an erstwhile employee of the employer and is retired, and thereafter re-employed again cannot claim confirmation as of right and cannot claim to be a regular employee. Again, this was a case where a fresh appointment was made and the petitioner therein was appointed on probation, but he was terminated later on during the course of his probation. That termination was challenged and an award was passed against the employee holding that the non-employment was justified. It is also accepted by the Labour Court that the petitioner was not governed by Section 2(oo) of the Industrial Disputes Act. His Lordship Justice M.Srinivasan, as his lordship then was, came to the conclusion that the confirmation was not automatic and that unless a specific order of

confirmation was passed, the petitioner could not claim that he should be treated as a regular employee. His Lordship also made a reference to the Supreme Court judgment in Binay Kumar Chatterjee's case and observed that a person, who had attained the age of superannuation and is given a fresh employment thereafter, could not claim the benefits of the standing orders and that such appointment is only contractual and the termination of his services will not amount to retrenchment within the meaning of Section 25F of the Industrial Disputes Act.

5. In my opinion, the said judgment is not all apposite to the controversy involved. I have also explained as to why the judgment in Binay Kumar Chatterjee's case would not apply to the present case. In both the cases, the question was regarding the standing orders and the benefits being claimed therein. The benefit under Payment of Gratuity Act is entirely an independent statutory benefit covered by a different Act altogether. We are concerned only with that Act. Both the judgments were, therefore, not apposite to the controversy and the appellate authority has clearly erred in relying upon them and holding that the petitioner was not an employee. The word 'employee' is defined in Section 2(e) as follows:

"2(e):- "employee" means any person (other than an apprentice) employed on wages, in any establishment, factory, mine, oil-field, plantation, port, railway company or shop, to do any skilled, semi-skilled or unskilled, manual, supervisory, technical or clerical work, whether the terms of such employment are express or implied, [and whether or not such person is employed in a managerial or administrative capacity, but does not include any such person who holds a post under the Central Government or a State Government and is governed by any other Act or by any rules providing for payment of gratuity.]"

When we see the simple language of the definition, there can be no doubt that the petitioner herein was an employed person. It was tried to be suggested that he did not earn wages. The word 'wages' is also defined in Section 2(s) and the definition is as follows:-

"2(s):- "wages" means all emoluments which are earned by an employee while on duty or on leave in accordance with the terms and conditions of his employment and which are paid or are payable to him in cash and includes dearness allowance but does not include any bonus, commission, house-rent allowance, overtime wages and any other allowance."

Reading the definition, there could be no doubt that the employee was being regularly paid for his services the so called 'honorarium' which would amount to emoluments paid for the work and therefore, would be covered in the term 'wages'. The different nomenclature given to the emoluments is of no consequence.

6. Mr.Raghavan, learned counsel for the third respondent however, by way of almost a desperate argument, relied on Section 4 and suggested that the section will apply only if the employee is superannuated or retired or has

resigned or has expired. Even accepting this argument, I am of the view that the petitioner would still be entitled because, he has resigned his job and therefore his case would be covered under Section 4(1)(b). There is no dispute about the fact that he has put in eight years of service and has thereafter ceased to serve on account of his resignation. There is also no dispute that the calculation is correct. Therefore, the appellate authority has erred in coming to the contrary conclusion. The order of the appellate authority is set aside and the earlier order passed by the Assistant Commissioner of Labour, Salem is restored. The Writ Petition is allowed. Rule is made absolute.

15.2.2002
Index : Yes
Website : Yes
kst.

To:
1.The Appellate Authority under
Payment of Gratuity Act cum
Deputy Commissioner of Labour
Salem.

2.The Controlling Authority under
Payment of Gratuity Act-cum-
Assistant Commissioner of Labour